Supreme Court, U.S.
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NO. 85-964

In The
Supreme Court of the United States
October Term, 1985

LIBERTARIAN PARTY OF VIRGINIA, et al.
Petitioners,

vs.

EARL DAVIS, et al.
Respondents.

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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ARGUMENT

1. The District Court Improperly Granted, And the Court of Appeals Affirmed The Grant Of, A Motion To Dismiss

At the outset, it must be emphasized that this case is before this Court as a result of the Court of Appeals' affirmance of the District Court's granting of a motion to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to F.R.C.P. 12(b)(6). Faced with a Rule 12(b)(6) motion, the District Court was obliged to determine whether that it appeared "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (emphasis added). Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed.2d 80, 84 (1957). Moreover, in ruling on a motion to

dismiss, "the material allegations of the complaint are taken as admitted." Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). Finally, "the complaint is to be liberally construed in favor of plaintiff," Ibid.[1/]

In this case, after setting forth the interests of the plaintiffs, the complaint alleged that the plaintiffs (hereinafter, "the Party") "will be denied their constitutionally guaranteed right to vote in the November, 1984 general election for the candidates of their choice if the names of electors selected by them are not printed upon the official ballot...." Complaint, 12. Moreover, the complaint alleged

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[1/] These canons of interpretation result from the requirement of Rule 8(a) 2 of the Federal Rules of Civil Procedure which require that a complaint contain only "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

that the distribution requirement "places an unconstitutional burden on the voting and associational rights guaranteed to" the Party. Complaint, 13. Thus, the complaint plainly alleged the burden imposed upon the Party by the distribution requirement to a degree sufficient to make clear that it was not "beyond doubt" that the Party could prove "no set of facts" entitling it to relief. Indeed, merely having asserted that fundamental rights had been violated in the context of a presidential election is sufficient to demonstrate that it is not "beyond doubt" that there exists "no set of facts" which would entitle the Libertarians to relief.

That the Party did not allege that it made "any attempt at all to comply" (State Bd. Brief, at 5) with the distribution requirement is irrelevant for

purposes of a motion to dismiss; the Party's efforts to comply would only become factors at a trial at which the court could analyze the character and magnitude of the injury to the constitutional rights of the Party. Thus, this Court should, at the very least, hold that the Party may be entitled to relief and remand the case for trial.

2. The State Board's Argument Itself Belies The Conflict Between Bergland v. Harris And This Case

In its Brief, the State Board attempts to deny the existence of any conflict between the 11th Circuit decision in Bergland v. Harris, 767 F.2d 1551 (11th Cir. 1985) and the decision of the Court of Appeals here. State Bd. Brief at p. 9. The Board's argument about the relevance of the allegedly distinguishable facts of Bergland, how-

ever, merely serves to underscore and re-emphasize the actual conflict -- the Bergland Court's call for the use of the three stage analytical process set forth in Anderson[2/] and its remand for lack of an adequate factual record consistent with Anderson. Here, by contrast, the Fourth Circuit did not even attempt to follow Anderson with regard to the need for such a factual inquiry. Compare Bergland, 767 F.2d, above, at 1553-4 with Libertarian Party of Virginia v. Davis, 766 F.2d 865, 867-8 (4th Cir. 1985).

As already noted above, the Motion to Dismiss in this case was erroneously handled by the District Court, thereby totally forestalling any such factual inquiry. See Libertarian Party of

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2/ Petition at p. 11, Anderson v. Celebrezze, 460 U.S., above, at 789.

Virginia v. Davis, 591 F. Supp. 1561 (E.D.Va. 1984). The Court of Appeals then compounded this critical error by affirming the District Court. If the Motion to Dismiss had been properly denied below -- or if the appeal had been properly upheld and the case remanded for such fact finding -- the conflict between this case and Bergland would not now exist. At trial, the Party could have fully demonstrated the real and actual effects of being required "to obtain less than one signature per day in each congressional district. . . ." State Bd. Brief, at p. 4.

At trial, the Party was prepared to prove its claims that the "all 10 congressional districts" distribution requirement in Virginia imposed insurmountable additional difficulties of time, expense and logistics upon it and

on other truly independent parties[3/] which also were unable to get on the 1984 Virginia ballot.[4/]

Thus, the State Board Brief clearly confuses the facts in Bergland with the holding about fact finding in Bergland, perhaps intentionally.

The State Board is similarly confused about the impact of the "witnessing" requirement at this stage of the proceedings. Rather than being directly challenged in the instant Petition, the witnessing requirement must now be viewed as just one additional part of

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3/ See, e.g., the Affidavit of an official of Socialist Workers Party attached hereto as Appendix D.

4/ The State Board contends that the distribution requirement could not have been "an insurmountable obstacle" because independent "groups" like the Party were able to get on the 1984 ballot. State Bd. Brief, at p. 4, n. 2. This contention is misleading because the only independent listed on the 1984 ballot was neither a "party" nor a "group", but rather a wealthy individual without a party constituency, philosophy, etc.

the matrix of burdens which, when "viewed in full," effectively and completely stifle independent party access to the Virginia ballot.[5/] Similarly, included in that matrix is the distribution requirement itself, as well as the complete absence of any "write-in" alternative, a factor also ignored below.

Another relevant fact not reviewed below, but crucial to the second and third stage of the Anderson analytical process, is the total lack of any demonstrated justification or need for the State's exclusion of independents in the legislative history[6/] or the public

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5/ Anderson, above, at 789.

6/ This lack of any justification is documented by the existing public record on the legislative history of §24.1-159. Included in the State's 1982 letter to the U.S. Justice Department under the Voting Rights Act, is the following narrative statement of the Bill's history:

(Footnote continued)

record.[7]

> "Factors leading to the proposed changes included:
>
> (1) Evidence that Virginia's requirements were lower than those of most states in the region.
>
> (2) Concern that a resulting proliferation of minor candidates would cause a long and unwieldy ballot, machine complications and administrative problems.
>
> (3) Desire to ensure that those on the statewide ballot be legitimate candidates who can demonstrate some statewide support for their candidacy."
>
> "Legislative History of S.B. 196, Chapter 650, 1982 Session." Letter dated July 30, 1982 from Gerald L. Baliles, Attorney General of Virginia to William Bradford Reynolds, Assistant Attorney General, U.S. Department of Justice. (Emphasis added).

Clearly, a perception of lower relative requirements, even if accurate, unsubstantiated fears of crowded ballots in futuro and an abstract ideal of statewide support cannot, by themselves, justify burdens on voting and associational rights.

[7] The existing public record on §24.1-159 is also clear that virtually every major civil rights and advocacy group opposed the legislation as creating impossible barriers to independent and minority candidates because of the regional differences in race, density and topography.
(Footnote continued)

Rather than relying on an ipse dixit approach, this Court should grant certiorari in order to mandate the fact finding called for by Anderson and, more recently, by Bergland, so as to review

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See, e.g., Gibson, "Groups Fight Ballot Measure," The Charlottesville Progress, Feb. 4. 1982, p. B1 (ACLU, Common Cause of Virginia, NAACP, Virginia Taxpayers Association); UPI, "U.S. Asked to Oppose New Law," Alexandria Gazette, June 24, 1982; ("B)lack independent candidates would be hardpressed to get enough (signatures) in the mountainous, rural Ninth District. . ." the ACLU said. "This places a specific burden on Blacks that is not placed on Whites because of the uneven distribution of Blacks in Virginia. . . ."); Whitley, "ACLU Charges State ELection Law is Biased," The Richmond News Leader, June 23, 1983 ("'In effect, (the distribution sections) require the candidate to have a statewide apparatus in place before he/she even begins to campaign. . . .'");

Turner, "ACLU Protests Latest State Changes," Afro, July 3, 1982, ("This means that black statewide candidates 'will face a disproportionate burden in qualifying for election due to the relative scarcity of black population in Congressional Districts six through 10,' according to the ACLU. . . .' 'In order to collect the 300 - 400 signatures needed to be certain of the required 200, each candidate will have to set up a campaign organization in each Congressional District well in advance of the election,' the ACLU told Justice in its letter dated June 22.")

the Party's complaint now before yet another Presidential election cycle begins. That this fact finding process has thus far been totally ignored by courts below in this case is both apparent and dispositive. This failure to follow Anderson, as demonstrated by the example of Bergland, requires a grant of certiorari in this case in order to clarify the role of federal courts in ballot access litigation.

3. The Confusion Of The Lower Courts And The State About Anderson Mandates A Grant Of Certiorari

The State Board's final attempt to dismiss the petition as de minimis is transparent and self-serving as well as unworthy of the dignity of this State, the Party and the voters.[8/] Even if,

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[8/] For one pointed example, Virginia has provided five Presidents of the United States. Facts About The Presidents, (4th Ed. 1981). For another, the Virginia Bill of Rights served as a (Footnote continued)

arguendo, Virginia is now and will always be "unique" in imposing its border-to-border distribution requirement[9], the effect of such a restriction on the voters of the Old Dominion alone would surely be enough mandate this Court's attention.[10]

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model for the Federal Bill of Rights. Finally, if each State's laws are to be dismissed seriatim as of no consequence to this Court, by this logic a nationwide adoption of similar "all state" distribution requirements by each of the other states could occur one state at a time. Such an adoption of distribution requirements in all 50 states would result in no new independent candidates or parties nationally if the voters in only one Congressional District in each state were to decide against such candidates. Such a result is the reductio ad absurdum of the State's Board argument that Virginia is unique and does not merit this Court's attention.

[9] State Bd. Brief, at p. 11.

[10] Virginia is now the thirteenth largest state in total population and the fourteenth in terms of numbers of voters in the last Presidential election. In numbers of electoral votes, Virginia is tied with Indiana and Georgia for eleventh place, with each state having a total of twelve electoral votes. Sources: Statistics of the Presidential and Congressional Election of November 6, 1984, pp. 68-69, U.S.G.P.O. (1985); World Alamanac, p. 653 (1986).

(Footnote continued)

The fact is, however, that just this term, the Court is already faced with two other cases involving the interpretation and application of Anderson

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Overall, Virginia is the sixteenth state in terms of density, with approximately 140 people per square mile. This compares, for example, with New Jersey, the most dense state with 1,000 people per square mile and Nebraska, the 41st state with 21 people per square mile. However, the ten Virginia Congressional Districts range, as follow, in density from 1,712.6 people per square mile to 59 people per square mile, or from far denser than New Jersey to the density, for example, of a state such as Vermont:

Rank By Density	Va. Cong. Dist.	Population Density	Comparison States
1	Dist. 2	1712.6	NJ-1000
2	Dist. 8	921.3	RI- 906
3	Dist. 3	750.6	
4	Dist. 10	725.1	CT- 644
5	Dist. 1	125.7	
6	Dist. 4	104.8	NH- 107
7	Dist. 6	102.0	GA- 99
8	Dist. 7	83.3	WI- 87
9	Dist. 9	73.7	MO- 72
10	Dist. 5	59.0	VT- 57

For the relative sizes of the Congressional Districts in Virginia, see the map designated as Appendix E attached hereto.

Sources: Statistical Abstract of the United States, p. 11 (1985); Congressional Districts of the 98th Congress, Virginia., p. 30 (Bureau of the Census 1983).

and its progeny to two other seemingly equally "unique" state laws.[11/] Moreover, other similar distribution requirements -- albeit hardly as draconian as §24.1-159 -- already exist in four other states in three other federal circuits.[12/] Petitioners respectfully suggest that as Virginia goes, so may go other states in enacting these overly restrictive and burdensome distribution requirements.[13/] Thus, other states may

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11/ See Munro v. Socialist Workers Party, prob. jur.ntd., 54 U.S.L.W. 3447 (U.S. January 14, 1986) (No. 85-565) and Tashjian v. Republican Party of Connecticut, prob.jur.ntd., 54 U.S.L.W. 3448, (U.S. January 14, 1986) (No. 85-766).

12/ Petition, pp. 3 - 4, n.2

13/ For example, Nebraska has just recently adopted such a distribution requirement. Neb. Leg. Bill No. 424, filed April 2, 1985, (amending Rev. Stat. of Neb. §32-526 (Reiss. 1943)). If this distribution requirement is widely adopted elsewhere, the Party's future is bleak. The Party has already noted the draining effect upon it of the costly ballot access litigation in the 1984 election. Petition at p. 34, n. 17. To that growing list of cases must now be added the following elec-

(Footnote continued)

soon adopt distribution requirements covering areas with equal or even greater disparity than Virginia in race, density or topography. Thus, it may be simplistically accurate to say that "only" a "unique" Virginia law is temporarily at issue today, the Board's de minimis argument belies the likelihood that tomorrow may see other such statutes enacted. A writ of certiorari should be granted now to resolve the Virginia challenge and to forestall such enactments elsewhere.

CONCLUSION

The State Board's Brief in Opposi-

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tion law suits as well: Libertarian Party v. Davis, 601 F. Supp. 522 (W.D.Ky. 1985); Libertarian Party v. Wallace, 586 F. Supp. 399 (D.C. Ala. 1984); Libertarian Party of Texas v. Fainter, 741 F.2d 728 (5th Cir. 1984); Libertarian Party of South Dakota v. Kundert, 579 F. Supp. 735 (D.S.D. 1984); and Libertarian Party of Oklahoma v. Oklahoma State Election Board, 593 F. Supp. 118 (W.D. Ok. 1984).

tion merely repeats the errors in analysis made by the courts below in this case. The Virginia statute requiring signatures from "all 10" Congressional Districts places unconstitutional burdens on the Party and, therefore, requires a grant of certiorari by this Court.

Respectfully submitted,

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Counsel gratefully acknowledges the assistance of J. Benedict Centifanti, Law Clerk and Amber Rose Greer, Legal Assistant, in the preparation of this Brief.

APPENDICES

APPENDIX D

AFFIDAVIT OF
MARK ZOLA
CAMPAIGN DIRECTOR
TIDEWATER, VIRGINIA
SOCIALIST WORKERS PARTY
(Original Being Filed With the Court)

February 11, 1986

I, Mark Zola, am the campaign director of the Tidewater branch of the Socialist Workers Party, with headquarters in Newport News, Va. In the winter and spring of 1984 I was the campaign director of the SWP in Virginia, coordinating our municipal, congressional, and presidential campaigns.

The Tidewater, Va. branch of the SWP decided at that time not to make the effort to win ballot status in Virginia for our national ticket of Mel Mason for president and Andrea Gonzalez for vice-president because of the onerous distribution requirement of the Virginia election law.

We thought -- based on previous experience -- that we could mount the considerable effort to successfully collect the necessary number of signatures statewide. However, we concluded that it would probably not be possible to meet the requirements in each of the ten congressional districts.

For a third party such as the Socialist Workers Party, the distribution requirement of the Virginia election law was a major obstacle to our full participation in the 1984 presidential elections.

/signed/
Mark Zola
5412 Jefferson Avenue
Newport News, Va. 23605

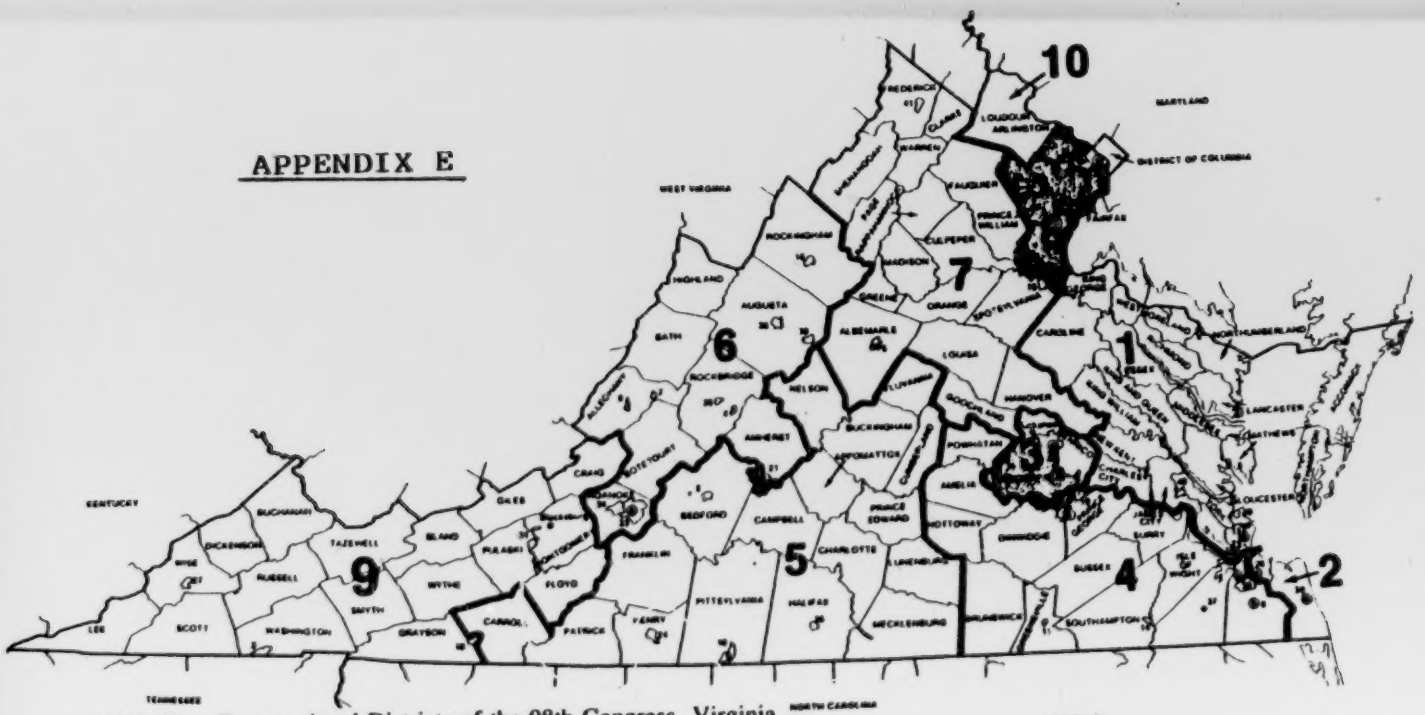
Sworn to and subscribed before me this 11th day of February, 1986.

Witness my hand and official seal.

Debora A. Pinckney /signed/
Notary Public
My Commission Expires March 24, 1989

BEST AVAILABLE COPY

APPENDIX E



SOURCE: Congressional Districts of the 98th Congress, Virginia

p. 48-21 (Bureau of the Census, 1983)

LEGEND

- 2 — Congressional district number
- Congressional district boundary
- Place of 100,000 or more inhabitants
- Place of 50,001 to 100,000 inhabitants
- Place of 25,001 to 50,000 inhabitants
- State capital underlined
- See inset map of county with 2 or more congressional districts

Note: Places of less than 100,000 inhabitants are not shown in Fairfax County